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In the Supreme Court of the United States

No. 163.

OCTOBER TERM, 1970.

THE CLEVELAND TRUST COMPANY and
A. DEAN PERRY, EXECUTORS OF THE ESTATE OF
HELEN WADE GREENE, DECEASED,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT.

TAXPAYER'S REPLY IN SUPPORT OF CERTIORARI.

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July 27, 1970.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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The Government, resisting review, reveals need for it:

1. The Government considers it "irrelevant" that the Internal Revenue Service (p. 9) "failed to follow its published procedures * * *."

This view is disturbing. It also is contrary to the standard declared by the United States Court of Appeals for the Fourth Circuit in its decision of December 30, 1969, in *United States v. Heffner* (4 C.A., 1969), 420 F.2d 809. That court held the Internal Revenue Service to its published procedures. The court's reason:

> "departures from an agency's procedures 'cannot be reconciled with the fundamental principle that ours is a government of laws, not men.'" 420 F.2d at 812.

The procedures the Fourth Circuit enforced were announced in an "IRS News Release" (p. 811) rather than, as here, with the support of Regulations and after due publication in the Federal Register. The court, dealing with the "News Release," deemed it unimportant that the procedures (p. 812) "were not promulgated in something formally labeled a 'Regulation' or adopted with strict regard to the Administrative Procedure Act * * *." The purpose of its ruling, the court said, is:

> "to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures." 420 F.2d at 812.

To this end the Fourth Circuit ruled:

> "An agency of the government must scrupulously observe rules, regulations, or procedures which it has established." 420 F.2d at 811.

2. The Government here explains that IRS repudiated only "in part" (p. 5) what is referred to as (pp. 2, 9) a "recommendation"—but of which the Court of Appeals, looking at what happened, correctly said:

> "*agreement was reached* between the IRS and the estate. The agreement provided for certain concessions by both sides." 421 F.2d at 480, Appendix pp. 44-45.

The Government's explanation points the need to consider whether the Internal Revenue Service, if it decides to repudiate, after it agrees, and assesses, may do so "in part"—retaining benefits but shedding burdens.

The Government further explains that (p. 10) "the estate was notified that it could withdraw the Collateral Agreement"—which the Government *also* received, *in addition to the $86,089.24 it received from the taxpayer* pursuant to the agreement. The explanation emphasizes

that it was indeed only "in part" that the Government repudiated its bargain.

The $86,089.24 the Government received, it *assessed*. This was formal ratification. The Government could not then, months later, say it had changed its mind, "*in part*" —but retain what the taxpayer paid pursuant to the agreement. Did it wish to change its mind it could do so by rejecting the agreement altogether (instead of affirming by assessing what it received) and by following the procedures, and the conditions, it had itself laid out for denouncing an agreement such as it here made.

The Government did neither.

Instead, it pocketed the money it got from the Taxpayer only by virtue of the agreement.

The writ, surely, should issue.

Respectfully submitted,

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